

2011 WL 11074312 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

Alden James ARQUETTE, Plaintiff-Appellant, Cross-Appellee,

v.

STATE OF HAWAII, Stephen H. Levins, Michael J.S. Moriyama,
and John Does 1-25, Defendant-Appellee, Cross-Appellant.

No. CAAP 11-0000416.

August 22, 2011.

Appeal from the 1) Order Granting Defendants' Motion for Summary Judgment Filed March 29, 2010, 2) Order Granting Granting Defendants' Second Motion for Summary Judgment Filed June 30, 2010, 3) Order Granting Plaintiff's Motion for Review and/or to Set Aside Taxation of Costs Filed August 23, 2010, and 4) Amended Judgment for Defendants State of Hawaii, Stephen H. Levins, and Michael J.S. Moriyama in Their Individual and Official Capacities, Against Plaintiff Alden James Arquette Filed April 19, 2010
First Circuit Court Honorable Karl K. Sakamoto Judge

Plaintiff-Appellant's Opening Brief

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PLAINTIFF-APPELLANT'S OPENING BRIEF

I. STATEMENT OF THE CASE

This case arises from the Office of Consumer Protection's (hereinafter "OCP") prosecution of Plaintiff-Appellant Alden James Arquette (hereinafter "Plaintiff") in *State of Hawaii v. Rodwin L. Wong, et al.*, Civil No. 04-1-1317-07 for alleged violations of trade regulations based on sales of deferred annuity contracts to **elderly** consumers.

A. THE UNDERLYING ACTION

In the Complaint in Civil No. 04-1-1317-07 filed on July 19, 2004 (hereinafter "Complaint") Defendants charged Plaintiff with the following violations:

- Count I: That Plaintiff misrepresented himself as a "paralegal" working with Defendant Rodwin L. Wong there to discuss estate planning services to gain access to financial information/assets of unnamed **elderly** consumers which was used by Plaintiff for the purpose of selling them deferred annuities with pay-outs scheduled to begin 10 to 20 years later and which included substantial early withdrawal fees, in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).
- Count II: That Plaintiff misrepresented himself as a "providing **elder** and/or estate planning services" through Defendant Wong's law practice to gain access to financial information/assets of unnamed **elderly** consumers which was used by Plaintiff for the purpose of selling them deferred annuities with pay-outs scheduled to begin 10 to 20 years later and which included substantial early withdrawal fees, in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).
- Count V: That Plaintiff engaged in a scheme to have unnamed **elderly** consumers replace, cancel or terminate existing life insurance or annuity contracts to purchase deferred annuities without providing consumers with information required by Hawaii law in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).
- Count VIII: That Plaintiff engaged in a scheme to have unnamed **elderly** consumers sell "securities" to purchase deferred annuities without analyzing and evaluating the suitability of selling such "securities" and or purchasing such "deferred annuities" in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).
- Count IX: That Plaintiff engaged in a scheme to have unnamed **elderly** consumers sell "securities" to purchase deferred annuities without being registered as a securities salesperson in violation of HRS §§ 485-14 and 487-13.
- Count XII: That Plaintiff engaged in a scheme to have unnamed **elderly** consumers sell "securities" to purchase deferred annuities without being a licensed investment advisor in violation of HRS §§ 485-14 and 487-13.
- Count XIII: That Plaintiff used high pressure sales tactics against unnamed **elderly** consumers in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).
- Count XIV: That Plaintiff engaged in a scheme to sell existing assets of consumers and sell them deferred annuities targeted at unnamed **elders** in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).

ROA, Prt 1, Adobe pp. 198-252.

In their Complaint Defendants did not identify any particular “**elderly**” consumer” affected by any of the violations alleged.

On October 13, 2004 Defendants moved ex parte for a preliminary injunction against Plaintiff based on his sale of annuities to Limuel and Hazel Cherry¹ (hereinafter “the Cherrys”). ROA, Prt 1, Adobe pp. 376-399.

On April 12, 2005 Defendants identified Joseph and Lillian Arruda (hereinafter “the Arrudas”), James Gamache (hereinafter “Gamache”), Solomon and Esther Paakaula (hereinafter “the Paakaulas”), and Melvin and Joan Pacheco (hereinafter “the *4 Pachecos”) as consumers whose transactions formed the bases for the initial charges against Plaintiff. ROA, Prt 1, Adobe pp. 400-434.

On December 21, 2005 the trial court granted summary judgment to Plaintiff on all charges alleged as to the Cherrys. ROA, Prt 1, Adobe pp. 435-436. On December 22, 2005 the trial court granted, in part, and denied, in part, summary judgment in favor of Plaintiff as to the remaining “consumers” (i.e., the Arrudas, Paakaulas, Pachecos and Gamache). ROA, Prt 1, Adobe pp. 437-439.

On May 16, 2006 the trial court denied Defendant Moriyama's motion to continue trial (ROA, Prt. 1, Adobe pp. 440-441) and ordered a severance of the trial as to Plaintiff (ROA, Prt 1, Adobe pp. 442-444).

On June 26, 2006 Defendant Moriyama stipulated to dismiss the balance of all remaining claims against Plaintiff. ROA, Prt 1, Adobe pp. 445-453.

B. THE INSTANT ACTION

Plaintiff filed the instant action on January 17, 2008, alleging claims against Defendants for malicious prosecution, negligent investigation, negligent failure to train and/or supervise, and punitive damages arising from the *initiation and maintenance* of the prosecution of him for alleged violations of trade regulations regarding the sales of deferred annuities *5 contracts to **elderly** consumers. ROA, Prt 1, Adobe pp. 14-25.

Defendants-Appellees (hereinafter “Defendants”) answered on May 29, 2008. ROA, Prt 1, Adobe pp. 38-49.

On December 24, 2009 Defendants moved for summary judgment as to Plaintiff's claims arising from the *initiation* of the prosecution. ROA, Prt 1, Adobe pp. 151-347. Plaintiff filed his opposition to the motion on February 22, 2010, ROA, Prt 1, Adobe pp. 351-542.

On March 29, 2010 the Circuit Court issued an order granting Defendants' motion as to all of Plaintiff's claims arising from the *initiation* of the prosecution against Plaintiff. ROA, Prt 1, Adobe 546-547.

On April 12, 2010 Defendants filed a second motion for summary judgment as to all of Plaintiff's remaining claims arising from the *maintenance* of the prosecution. ROA, Prt 2, Adobe pp. 9-219. Plaintiff filed his opposition to the motion June 4, 2010, ROA, Prt 2, Adobe pp. 232-430, and Defendants filed their reply on June 10, 2010, ROA, Prt 2, Adobe pp. 431-463.

On June 30, 2010 the Circuit Court issued an order granting Defendants' motion as to Plaintiff's claims arising from the *maintenance* of the prosecution against Plaintiff. ROA, Prt 2, Adobe 467-469.

On July 2, 2010 Defendants noticed the taxation of their costs against Plaintiff, ROA, Prt 2, Adobe pp. 470-476, *6 which was granted by the clerk on July 8, 2010, ROA, Prt 2, Adobe pp. 477-478.

On July 13, 2010 Plaintiff moved for a review and/or for the setting aside of the taxation of costs, ROA, Prt 2, Adobe pp. 479-486, and Defendants filed their opposition on July 28, 2010, ROA, Prt 2, Adobe pp. 487-496. On August 23, 2010 the Circuit Court issued an order granting, in part, Plaintiff's motion. ROA, Prt 2, Adobe pp. 497-498. Final Judgment was entered in favor of Defendants on September 3, 2010. ROA, Prt 2, Adobe pp. 499-500.

Plaintiff-Appellant filed a timely notice of appeal on September 21, 2010. ROA, Prt 2, Adobe pp. 501-512. The Hawaii Intermediate Court of Appeals issued an order dismissing the appeal for lack of jurisdiction on March 9, 2011. ROA, Prt 2, Adobe pp. 574-577.

Amended Final Judgment was entered in favor of Defendants on April 19, 2011. ROA, Prt 2, Adobe pp. 578-580.

Plaintiff-Appellant filed a timely notice of appeal on May 18, 2011. ROA, Prt 2, Adobe pp. 581-593.

II. POINTS OF ERROR

1. The trial court erred in determining as a matter of law that Defendants had sufficient evidence to establish probable cause to initiate the prosecution of Plaintiff because there was sufficient evidence to create a genuine issue of material fact as *7 to the issue.

The court believes there is a genuine issue of material fact as to number 1, terminated in plaintiff's favor. The court does not believe that there is a genuine issue of material fact as to number 2 and number 3, initiated with probable cause and not initiated with malice.²

So basically, the court finds there's no genuine issue of material fact that the complaint was initiated with probable cause. Therefore, as to the arguments of negligent investigation by Moriyama, because there's no finding that he lacked probable cause to initiate the complaint, there's insufficient support for the negligent investigation by Moriyama and, therefore, also the negligent supervision training on the part of the State or through Mr. Levins.

ROA, Prt 2, Adobe p. 548, Doc. #28, at pp. 25, 29-30.

2. The trial court erred in determining that [Section 487-1, Haw. Rev. Stat.](#) does not create an actionable duty of care on the part of the Office of Consumer Protection to support claims for negligence.

The court, as noted, does not believe that under 487-1, it creates a private cause of action. The court does not believe that was the intent, to create a private cause of action arising from 487-1. Based on that, the motion for summary judgment is granted.

ROA, Prt 2, Adobe p. 548, Doc. #28, at pp. 30.

*8 3. The trial court erred in determining as a matter of law that Hawaii does not recognize a cause of action in tort for continuing the prosecution of an individual when further investigation reveals a lack of probable cause to support the prosecution.

When we left off with the last Motion for Summary Judgment, the remaining issue is whether Hawaii would recognize a malicious prosecution case based on the maintenance or continued actions of defendant here.

And the Court viewed that as a legal question and asked counsel to brief these issues on what the existing Hawaii law was at that point.

The Court looks at *Young vs. Allstate* for guidance. In [Young v. Allstate](#) in 119 Haw. at 417, it points out what the elements of the tort for malicious prosecution is. And I will quote it.

“The tort of malicious prosecution permits a plaintiff to recover when the plaintiff shows that the prior proceedings were, one, terminated in the plaintiff's favor; two, initiated without probable cause; and, three, initiated with malice.”

The Court goes on to say that, “Because a malicious prosecution claim is triggered when the unsuccessful party initiated the lawsuit, the defendant is not liable for the proceedings unless he has initiated them.”

Throughout the case the Court focuses on the term “initiated.” It's also found on page 418 where it says, “When a plaintiff initiated a lawsuit against it with malice and without probable cause,” on page - 418 it says, “The tort of malicious prosecution acknowledges the special particular harms that a defendant suffers when a lawsuit is maliciously initiated against it.” And it follows that sentence where it discusses the dissent saying, “The dissent ignores the requirement that the lawsuit was initiated against the defendant and trivializes the harms that the defendant inflicts onto the defendant by initiating a baseless lawsuit.” (sic)

So here the elements clearly enunciated by the Supreme Court focuses on the initiation, either initiation without probable cause or initiation with malice. That is quite different from an element that *9 would allow a cause of action where it says initiated, continued and maintained without probable cause, and initiated, maintained and continued with malice. I think those two elements would be distinctly different.

So clearly the Supreme Court has stated that the malicious prosecution is limited to initiation, either in count - in Element 2 with regard to probable cause or to the third element with regard to malice.

The *Young vs. Allstate* case dealt with the question of whether there should be an expansion of the tort of malicious prosecution by allowing the tort of malicious defense cause of action. And there the Supreme Court rejected it.

On page 422, in rejecting that, they do cite to a California case. And, again, the plaintiffs cite a California case for the recognition of a tort of continued or maintained malicious prosecution.

But in this context, when the Supreme Court cites to that Supreme Court case, the citing portions where it says that the tort of malicious prosecution should not be expanded, and that's on page 422, and they talk about other remedies, and it really shows their reluctance to expand the tort of malicious prosecution in Hawaii.

So in that context, on a second level, the Court has shown - the appellate court has shown its reluctance to expand the malicious prosecution tort. And here, the request by the prosecution, by the plaintiffs, is to expand the tort of malicious prosecution to allow maintenance or continued conduct following initiation.

Based on those two points and the *Young vs. Allstate* case, the Court believe that existing law is to recognize the initiation portion and not continued or maintenance. And this Court will not expand the malicious prosecution tort to include such action.

Based on that, the motion is granted.

First Supplemental ROA, Adobe pp 20-23.

III. STANDARD OF REVIEW

This Court reviews a circuit court's grant of summary judgment *de novo*. The standard for granting a motion for summary judgment is settled:

***10** Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and inferences drawn therefrom in the light most favorable to the party opposing the motion.

Kau v. City and County of Honolulu, 104 Haw. 468, 473-474, 92 P.3d 477, 482-483 (2004).

Findings of fact are reviewed under the clearly erroneous standard. *Child Support Enforcement Agency v. Roe*, 96 Haw. 1, 11, 25 P.3d 60, 70 (2001). A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. *Id.*

This Court reviews conclusions of law *de novo* under the right or wrong standard. *Roxa v. Marcos*, 89 Haw. 91, 115, 969 P.2d 1209, 1233 (1998); *State v. Camara*, 81 Haw. 324, 329, 916 P.2d 1225, 1230 (1996) (reviewing the interpretation of a statute *de novo*); *Tatibouet v. Ellsworth*, 99 Haw. 226, 233, 54 P.3d 397 (2002).

***11 IV. ARGUMENT**

For the reasons set forth below Plaintiff submits that this Court should determine that the trial court erred in granting Defendants' judgment in their favor because: (1) the evidence, when viewed in the light most favorable to Plaintiff, was sufficient to establish a question of material fact as to whether there was probable cause to initiate the prosecution of Plaintiff in the underlying action; (2) the Defendants have a duty in tort to exercise due care in exercising their statutory dues with due regard to a person's legitimate business activities arising under [Haw. Rev. Stat. §487-1](#); and (3) confining the tort of malicious prosecution only to the initiation of an action is without support in authority or in principle.

A. MALICIOUS PROSECUTION

In *Young v. Allstate Insurance Co.*, 119 Haw. 403, 198 P.3d 666 (2008) the Supreme Court described the tort of malicious prosecution as follows:

The tort of malicious prosecution protects the interest in freedom from unjustifiable litigation. Prosser and Keeton on Torts, §119, at 870. The tort serves to compensate a party sued in a malicious and meritless legal action for his or her financial costs, as well as psychic damage from the shock of the unfounded allegations in the pleadings and the loss of his reputation in the community as a result of the filing and notoriety of the base allegations in the pleadings which are public records. *Stanley v. Superior Court*, 130 Cal.App.3d 460, 468, 181 Cal. Rptr. 878, 882 (1982) (citing *Bertero v. Nat'l Gen. Corp.*, 13 Cal.3d 43, 50-51, 529 P.2d 608, 614, 181 Cal.Rptr. 184, 190 (1974); see also, ***12** *Hewitt v. Rice*, 119 P.3d 541, 544 (Colo.Ct.App. 2004) (“the purpose of an action for malicious prosecution is to compensate a person sued in a malicious and baseless legal action for attorney fees, costs, psychic damage, and loss of reputation.”). As the party “haled into court” in a meritless and malicious suit, “the plaintiff’s interests have been invaded, the plaintiff’s reputation has suffered, and the plaintiff has been put to the expense of defense.” Prosser and Keeton on Torts, § 119, at 871. Specifically, “wrongful civil suits can destroy a livelihood, devastate a business, or chill debate on public issues. Dan B. Dobbs, *The Law of Torts*, § 436, at 1228 (2001). see also, *Bertero*, 13

Cal.3d at 50-51, 529 P.2d at 614, 118 Cal.Rptr. At 190 (“The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings.”); *White v. Frank*, 855 f.2d 956, 960 n.3 (2nd Cir. 1988)(noting that the tort of malicious prosecution “provides redress, though only under tightly guarded circumstances, from unjustifiable litigation in order to protect the plaintiff’s financial interests and interest in bodily freedom, as well as his reputation.” (citing *Fowler V. Harper*, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Tex.L.Rev. 157, 168-70 (1937)); cf. *Ellis v. Harland Bartholomew and Assocs.*, 1 Haw.App. 420, 428, 620 P.2d 744, 750 (1980) (observing, in the context of the dismissal of a civil proceeding, that “somewhere along the line, the rights of the defendant to be free from costly and harassing litigation must be considered. So too must the time and energies of our courts and the rights of would be litigants awaiting their turn to have other matters resolved.” (quoting *Von Poppenheim v. Portland Boxing and Wrestling Comm’n*, 422 F.2d 1047, 1054 (9th Cir. 1971)).

Id., 119 Haw. at 418, 198 P.3d at 681 (2008).

The tort of malicious prosecution has three essential elements: (1) that the prior proceedings were terminated in the plaintiff’s favor, (2) that the prior proceedings were initiated *13 without probable cause, and (3) that the prior proceedings were initiated with malice. *Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass’n*, 2 Haw. App. 316, 318, 631 P.2d 600, 603 (1981).

Probable cause for filing a lawsuit exists where a person reasonably believes in the existence of facts upon which the claim is based and correctly or reasonably believes that under those facts the claim may be valid under the applicable law. *Id.*, 2 Haw. App. at 318, 631 P.2d at 603 (citing *Restatement (Second), Torts §675* (1977)). A person’s subjective beliefs are not dispositive of whether his conduct was reasonable. *State v. Dumlao*, 6 Haw. App. 173, 177, 715 P.2d 822, 827 (1986)(holding that the reasonable person test is strictly objective and the defendant’s mental state is not determinative of whether his/her conduct was reasonable).

Generally the question of whether one has acted reasonably under the circumstances is for the trier of fact to determine, and where reasonable minds might differ as to the reasonableness of a parties conduct, the question is for the jury. *Matsuura v. E.I. Du Pont*, 102 Haw. 149, 163, 73 P.3d 687, 701 (2003).

A voluntary dismissal may give rise to an inference that there was a lack of probable cause. *Brodie, supra*, 2 Haw. App. 316, 321, 631 P.2d at 604-605; See also, *14 *Restatement (Second), Torts §665(1)* (1977)) (“the termination of the proceedings in favor of the accused at the instance of the private prosecutor who initiated them... is evidence of lack of probable cause.”).

1. EVIDENCE REGARDING PROBABLE CAUSE

In determining that Defendants had sufficient evidence to establish probable cause to initiate the prosecution of Plaintiff the trial court relied entirely on the declaration of Defendant Michael J.S. Moriyama.

In explaining its determination the trial court stated:

The court looks at the submissions by Mr. Moriyama, basically, the declaration that he has submitted with his motion. On paragraph 4, it begins that throughout the investigation, he informed his supervisor, Mr. Levins, of OCP of the various aspects and status of the investigation. He had several discussions with investigators and attorneys in the insurance division and SEB of the DCCA.

Paragraph 5 notes that he did not know of Arquette.

Paragraph 6, that prior to the filing of the lawsuit, he provided copies of the complaint to Mr. Levins and the director of DCCA, Mr. Recktenwald, and the attorneys in the insurance division and SEB for review.

The complaint in this case, as set forth in paragraph 7, was filed July 19, 2004.

In paragraph number 8, Mr. Moriyama states that he was acting in his capacity as a litigation attorney for the OCP and at no time did he exceed or violate his understanding and statutory authority.

Paragraph 9, it notes instructions by Mr. Levins in November, 2001 to review the OCP's investigation of Dan Fox and others; that he inspected the records of OCP on file and talked with OCP investigators involved in the cases, reviewed the investigation files of the insurance division and SEB and had several discussions with such investigators and attorneys of those offices. *15 He also reported his findings to Mr. Levins.

Number 10 sets forth what Mr. Moriyama notes from the various investigations.

Paragraph 11 notes that the OCP had actively investigated the scheme, as noted in paragraph 10, involving Mr. Arquette for two and a half years before litigation was commenced or initiated.

Paragraph 12 notes the procedures they went through in their investigation to take a sampling.

Paragraph 13 notes that of the 33 **elderly** consumers initially identified, they narrowed it down to six that happened to have dealt with Arquette. They note specifically that would be Arruda, Gamache, Muraoka, Paakaula, and Pacheco.

Again, in paragraph 14, they whittled down the sample to 19. It notes that Arruda was suffering from serious health issues at the time, and was dropped from the sample.

On 15, it notes the adding of Pacheco.

Paragraph 17, that the OCP investigated the transactions of more than 40 out of the hundreds of consumers who were sold annuities; that OCP knew of four individuals or couples who dealt with Arquette and would be identified as witnesses, naming specifically Arruda, Gamache, Paakaula, and Pacheco.

It also notes that the Muraokas, who were on the list of investigations, were dropped from the investigation as a result apparently of death to Zenichi in February, 2005, and Itsue who died in 2006.

In August of 2002, prior to the filing and initiation of this case, it notes that Moriyama, to better understand standards and practices of estate planning attorneys, attended the estate planning in Hawaii.

In paragraph 20, in July 20th, 2006, he also educated himself with the **elder** law and care, but notably, this is after the initiation of the complaint.

Paragraph 21 notes that prior to the filing of the complaint, he informally consulted with various estate planning attorneys practicing in Hawaii. And this occurred whenever various issues came up during the course of his investigation and OCP's investigation.

Prior to filing of the complaint, as noted in paragraph 22, it notes that he also consulted with two licensed insurance agents to get a better understanding of deferred annuities.

From paragraph 25, Mr. Moriyama engaged in personal interviews of the Gamachis in 2002 and notes *16 some of the findings throughout those paragraphs.

Paragraph 30, in March 2004, again, prior to the initiation, he contacted Earl Muraoka, the adult son of Itsue Morioka, and had the various information obtained as reflected in the following paragraphs.

In paragraph 32, there was interviews of Esther and Soloman Paakaula, and the following paragraphs note some of the findings of that investigation.

In March, 2002, prior to the initiation of the filing of this complaint, there were OCP investigator speaking to the Pachecos and some of the findings noted in the subsequent paragraphs.

The submissions by the plaintiff here, it's not real clear - the Paakaulas and Pachecos were happy with their annuity contracts, it's not real clear if that satisfaction occurred prior to the initiation of the complaint or reflects the current status of it. But even in the light most favorable, omitting the Paakaulas' involvement and the Pacheco's involvement, involvement of Moriyama's investigation in this matter regarding Arquette still involved the Arudas, the Gamachis, the Muraokas, and all these various facts that were covered by this court to which the court does not believe has been sufficiently disputed to create genuine issues of material fact regarding probable cause for filing the complaint in this case.

ROA, Prt 2, Adobe p. 548, Doc #28, at pp. 25-29.

As noted above by the trial court, the genesis of the underlying action was an OCP investigation of Dan Fox. Defendants presented no evidence from their investigation implicating Plaintiff in the sale of any annuities. ROA, Prt 1, Adobe pp. 253-258.

Defendants alleged that from their investigation they had identified six **elderly** consumers “that happened to have dealt with Arquette,” i.e., Arruda, Gamache, Muraoka, Esther and Solomon Paakaula, and Pacheco (ROA, Prt 1, Adobe p. 183), however, Defendants presented no evidence that Plaintiff was ***17** involved in the sale of annuities to any of those consumers. Defendants' only evidence merely showed that Plaintiff had presented living trust documents to and received payment for Gamache and Muraoka in 1999 or 2000. ROA, Prt 1, Adobe pp. 276-281; ROA, Prt 2, Adobe pp. 303-332.

When viewed in the light most favorable to Plaintiff, Defendants' evidence fails to establish any reasonable basis for prosecuting Plaintiff based on the sale of annuities to Arruda, Gamache, Muraoka, Paakaulas or Pacheco.

In addition, in an affidavit filed in the underlying action, i.e., Civil No. 04-1-1317-07, Plaintiff stated, in relevant part:

2. In or about March, 1999, I began working for the Law Offices of Rodwin Wong.
3. All work I performed for the Law Offices of Rodwin Wong was at the direction of and under the supervision and responsibility of Defendant RODWIN WONG [hereinafter Defendant “WONG”]. Defendantt WONG described by job as being a paralegal.
4. Prior to my employment by Defendant WONG, I had no training or education relative to the practice of law.
5. I did not sell, attempt to sell and never even discussed insurance products with Joseph and Lillian Arruda [hereinafter collectively the “ARRUDAS”]; Solomon and Esther Paakaula [hereinafter collectively the “PAAKAULAS”]; Melvin and Joan Pacheco [hereinafter collectively the “PACHECOS”]; and James Gamache [hereinafter “GAMACHE”].
6. I did not sell, attempt to sell and never even discussed the sale of securities with the ARRUDAS, PAAKAULAS, PACHECOS and GAMACHE.
9. I did not obtain an insurance license of any kind until January, 2001, when I obtained an insurance “solicitors” license from the State of Hawaii. I never ***18** attempted to sell insurance products of any kind prior to obtaining this license.

10. Defendant DAN FOX AND ASSOCIATES, INC. [hereinafter Defendant “DFAI”] was my designated “general agent” as required by law at that time.

11. As a result of changes in the Insurance laws, I became an insurance “producer” on July 1, 2002 and was no longer required to sell insurance by or through a designated “general agent.”

12. I was never privy to the relationship between the Law Offices of Rodwin Wong, Defendant WONG, Defendant DAN FOX or Defendant DFAI.

ROA, Prt 1, Adobe pp. 482-484.

2. THE DISMISSAL OF THE UNDERLYING ACTION

Undisputed evidence shows that the circumstances surrounding Defendants' voluntary dismissal of their claims against Plaintiff in the underlying action support an inference that there was a lack of probable cause to initiate any prosecution of Plaintiff in the underlying action.

Since the Complaint in Civil No. 04-1-1317-07 did not identify any consumers who were victimized by the alleged acts and/or omissions charged in that case, in December, 2004, Plaintiff requested that Defendants produce and/or identify the evidence upon which the charges against Plaintiff were based. On January 27, 2005, *five months after he had charged Plaintiff*, Defendants objected on the ground that *discovery had not been completed*. ROA, Prt 1, Adobe pp. 454-470. As a result, Plaintiff was required to move to compel answers to interrogatories which, in relevant part, was granted by the trial court on March 18, 2005. ROA, Prt 1, Adobe pp. 471-478, and 479- *19 481.

It was only then that Defendants identified the *Arrudas*, *Gamache*, *the Paakaulas*, *the Pachecos*, and the Cherrys³ as consumers whose contacts with Plaintiff formed the bases for the charges (ROA, Prt 1, Adobe pp. 400-434); however, Defendants had no evidence to dispute Plaintiff's assertions that he had worked as a paralegal for attorney Rodwin Wong since 1999, that he had never sold, attempted to sell, or even discussed insurance products/annuities or securities with **the Arrudas, Gamache, the Paakaulas, or the Pachecos**, and that no complaints ever had been filed against him for violating insurance or securities regulations. ROA, Prt 1, Adobe pp. 482-484.

Moreover, the record in Civil No. 04-1-1317-07 also shows **the Paakaulas** and **the Pachecos** never authorized or were interested in being involved in the underlying action. ROA, Prt 1, Adobe pp. 485-487. They had no complaint against Plaintiff.

In apparent recognition that there was no evidence to support the Defendants' charges against Plaintiff, on March 24, 2006, Defendants sought to modify a protective order previously entered by the trial court so they could obtain discovery of confidential financial information about Plaintiff's clients *20 without having to notify and obtain the consent of the individuals whose information would be disclosed (ROA, Prt 1, Adobe p. 488) which was denied (ROA, Prt 1, Adobe pp. 489-490), and on April 11, 2006, Defendants moved to continue the trial (ROA, Prt 1, Adobe p. 491).

At a hearing on April 13, 2006, the following discussion took place as to Plaintiff's Motion to Continue Trial:
THE COURT: And what discovery's been done and what hasn't been done?

MR. MATSUOKA: He hasn't identified any discovery that he's going to do. He just keeps saying - I mean all of his responses to everything has been discovery's ongoing. But we haven't -

MR. MORIYAMA: All our discovery requests are out. But everybody's saying the protective order says we don't turn over anything until we get consent from our clients. My discovery has been sitting out there since soon after the complaint was filed.

THE COURT: Well, I guess the basic problem I have is you brought the case. And it usually - you brought the case. You have investigators. Typically these cases start with consumer complaints. So you should be ready to go.

MR. MORIYAMA: Right. I think then, Your Honor, in this case it's a little different, right? Because we have consumer complaints. We've investigated those complaints. But there are indications that there are - they were very successful in what they did. And so there were a lot of people that they made sales to. We don't know who those people are. The defendants know who those people are. And right now under the protective order they're not disclosing, they're not giving us information on those people.

And so I think if we modify the protective order then we'll go forth with our - enforcing our discovery requests, so we can get at the information.

THE COURT: Well, I've denied the motion to modify the protective order. So now what are you going to do?

MR. MORIYAMA: Probably file a motion to - for *21 an order ordering the defendants to get consent from their clients to release the information.

THE COURT: And what if I deny that?

MR. MORIYAMA: Then we're going to go forth with the case that we have right now, which I don't think is quite right. But we'll do it.

ROA, Prt 1, Adobe pp. 492-493.

By order entered on May 16, 2006, the trial court denied Defendants' motion to continue trial and severed the trial as to Plaintiff (ROA, Prt 1, Adobe pp. 440-441, 442-444), and on June 26, 2006 Defendants agreed to dismiss all remaining claims as to Plaintiff (ROA, Prt 1, Adobe pp. 445-453).

Accordingly, this Court should determine that when viewed in the light most favorable to Plaintiff, there was and still is a genuine issue of material fact as to whether probable cause ever existed to initiate any prosecution of Plaintiff in the underlying case.

B. PLAINTIFF'S NEGLIGENCE CLAIM

Plaintiff submits that Defendants had a duty in tort to exercise due care in exercising their statutory authority under [Haw. Rev. Stat. §487-1](#) to regulate or affect Plaintiff's legitimate business activities arising under [Haw. Rev. Stat. §487-1](#). [Lee v. Corregadore](#), 83 Haw. 154, 172, 925 P.2d 324, 342 (1996)(Duty in a negligence action may be defined by common law or by statute). [HRS §487-1](#), in relevant part, provides the following:

The public health, welfare and interest require a *22 strong and effective consumer protection program *to protect the interests of* both the consumer public and *the legitimate business person*.

In construing a statute the court's primary obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. When construing a statute, the fundamental starting point is the language of the statute itself, and where the statutory language is plain and unambiguous the court's sole duty is to give effect to its plain and obvious meaning. Departure from the literal construction of a statute is justified only if such a construction yields an absurd and unjust result obviously inconsistent with the purposes and policies of the statute. [Leslie v. Board of Appeals](#), 109 Haw. 384, 393, 126 P.3d 1071, 1080 (2006).

Whether or not [HRS 487-1](#) creates a private cause of action, that determination alone is not dispositive. Even “[i]f a statute contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence. [Restatement \(Second\) of Torts § 285](#) comment c (1965). Courts may adopt the requirements of a statute as the standard of care when the purpose of the statute is to protect a class of persons which *23 includes the one whose interest in invaded. [Restatement \(Second\) of Torts § 286\(a\)](#) (1965).” *Lee v. Corregadore*, 83 Haw. 154, 173, 925 P.2d 324, 343 (1996)(hereinafter “Lee”).

In *Tseu v. Jevte*, 88 Haw. 85, 962 P.2d 344 (1998) (hereinafter “Tseu”), the Supreme Court vacated the dismissal of a counterclaim of negligent investigation brought against the Hawaii Civil Rights Commission (hereinafter “HCRC”) and expressly ruled that “there exists a duty of reasonable care in the exercise of statutorily granted authority,” and government attorneys are subject to liability for actions they prosecute under the common law of negligence, i.e.:

1. A duty or obligation, recognized by law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
2. A failure on the defendant's part to conform to the standard required: a breach of the duty;
3. A reasonably close causal connection between the conduct and the resulting injury and;
4. Actual loss or damage resulting to the interests of another.

Id., 88 Haw. at 91-92, 962 P.2d at 350-351.

Here Defendants prosecuted Plaintiff in the underlying action where the undisputed evidence showed Plaintiff had only engaged in legitimate business activities. Although [HRS §487-1](#) clearly requires Defendants to protect the interests of “the legitimate business person,” even though the statute contains no express provision that its violation shall result in tort liability, and no implication to that effect, the statute can be *24 adopted as the standard of care for attorneys of the Office of Consumer Protection, i.e., to exercise their statutory duties with due regard to a person's legitimate business activities (See, *Lee, supra*; *Tseu, supra*).

In addition, the Supreme Court has recognized that the State, as any person, has an affirmative duty to refrain from conduct (or, as the circumstances may warrant, to take whatever affirmative steps are reasonable to protect another) to those who are foreseeably at risk of harm by the State's conduct. *Doe Parents No. 1 v. State of Hawaii, Department of Education*, 100 Haw. 34, 72, 58 P.3d 545, 583 (2002). Here it is undisputed that Defendants prosecuted Plaintiff when all of the evidence they had gathered in their investigation and in discovery showed only that Plaintiff had engaged in legitimate business activities. Accordingly, Defendants clearly placed Plaintiff at a foreseeable risk of harm by proceeding against him without any evidence to justify their acts.

This Court should determine that the trial court erred in its determination that there is no actionable duty in tort to support Plaintiff's claim for negligent investigation and that the lower court's ruling contradicts principles established by the Hawaii Supreme Court.

C. PLAINTIFF'S CLAIMS ARISING FROM CONTINUING THE UNDERLYING PROSECUTION

Plaintiff submits that the trial court's determination *25 that Hawaii does not recognize a malicious prosecution claim based upon the deliberate continuation of an action after learning that there is no probable cause to prosecute is without support in authority or in principle.

Here the trial court relied on the Supreme Court's decision in *Young v. Allstate Insurance Co.*, supra which the court itself acknowledged addressed only the issue of whether the tort of malicious prosecution should be expanded to include a cause of action for malicious defense. First Supplemental ROA, Adobe pp. 20-23. Accordingly, the trial court's ruling is not controlled by any existing Hawaii law.

Hawaii has adopted the common law as the law of the State of Hawaii. See, [H.R.S. §1-1](#); Cf., *Brodie*, supra 2 Haw.App. at 318, 631 P.2d at 603 (1971)(adopting [Restatement \(Second\) of Torts §675](#) defining probable cause for the purposes of an action for malicious prosecution). The [Restatement \(Second\) of Torts, §674 \(1976\)](#) describes a common law action for malicious prosecution as follows:

One who takes an active part in the initiation, *continuation* or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have been terminated in favor of the person against whom they are brought.

***26** In *Zamos v. Stroud*, 87 P.3d 802 (2004), the Supreme Court of California addressed the issue of whether the tort of malicious prosecution should include *continuing* to prosecute a lawsuit after learning that there is no probable cause for the proceeding. In determining that it should/does the Court, in relevant part, explained:

[S]o far as our research reveals, the rule in every other state that has addressed the question is, and in many states has long been, that the tort of malicious prosecution does include continuing to prosecute a lawsuit discovered to lack probable cause.

Over 25 years ago the drafters of the Restatement Second of Torts (Restatement) stated that one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had initiated the proceeding. (Rest., 674, com. c, p. 453) Indeed, almost 80 years ago Corpus Juris, in reciting the elements of an action for malicious prosecution, stated that first element as the commencement or continuance of an original criminal or civil judicial proceedings (38 C.J. (1925) Malicious Prosecution, 5, p. 386, italics added; see 34 Am.Jur. (1941) Malicious Prosecution, 26, p. 718.)

The Restatement's position on this question has been adopted or was anticipated by the courts of a substantial number of states: Alabama (*Laney v. Glidden Co., Inc.* (1940) 239 Ala. 396, 194 So. 849, 851-852); Arizona (*Smith v. Lucia* (Ct.App. 1992) 173 Ariz. 290, 842 P.2d 1301, 1308); Arkansas (*McLaughlin v. Cox* (1996) 324 Ark. 361, 922 S.W.2d 327, 331-332); Colorado (*Slee v. Simpson* (1932) 91 Colo. 461, 15 P.2d 1084, 1085); Idaho (*Badell v. Beeks* (1988) 115 Idaho 101, 765 P.2d 126, 128); Iowa (*Wilson v. Hayes* (Iowa 1990) 464 N.W.2d 250, 264); Kansas (*Nelson v. Miller* (1980) 227 Kan. 271, 607 P.2d 438, 447-448); Mississippi (*Benjamin v. Hooper Electronic Supply Co., Inc.* (Miss. 1990) 568 So.2d 1182, 1189, fn. 6); New York (*Broughton v. State of New York* (1975) 37 N.Y.2d 451, 457, 373 N.Y.S. 2d 87, 335 N.E.2d 310); Ohio (***27** *Siegel v. O.M. Scott & Sons Co.* (Ohio Ct.App. 1943) 73 Ohio App. 347, 56 N.E.2d 345, 347); Oregon (*Wroten v. Lenske* (1992) 114 Or.App. 305, 835 P.2d 931, 933-934); Pennsylvania (*Wenger v. Philips* (1990) 195 Pa. 214, 45 A. 927); and Washington (*Banks v. Nordstrom, Inc.* (1990) 57 Wash.App. 251, 787 P.2d 953, 956-957).

Just as it is without support in authority, the limitation defendants urge is also without support in principle. Malicious prosecution "is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice." (*Bertero*, supra, 13 Cal.3d at p. 50, 118 Cal.Rptr. 184, 529 P.2d 608; see *Crowley*, supra, 8 Cal.4th at p. 677, 34 Cal.Rptr.2d 386, 881 P.2d 1083.) Continuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset. (See 1 Harper et al., *The Law of Torts* (3d ed. 1996) § 4.3, p. 4:13 ["Clearly, it is as much a wrong against the victim and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such a proceeding

in the first place”].) As the Court of Appeals in this case observed, “It makes little sense to hold attorneys accountable for their knowledge when they file a lawsuit, but not for their knowledge the next day.”

[Id.](#), 87 P.3d at 807.

Because Hawaii has adopted the common law as the law of the State of Hawaii, and the rule in every other state that has addressed the question is that the tort of malicious prosecution does include continuing to prosecute a lawsuit discovered to lack probable cause, the trial court's determination that the common law tort of malicious prosecution is limited to the initiation of a suit is without support in authority or in principle.

Accordingly this Court should recognize that the tort *28 of malicious prosecution includes the **continuation** of an action that is found to lack probable cause.

V. CONCLUSION

For all of the reasons set forth above this Court should determine that the trial court erred in granting judgment in Defendants' favor because: (1) the evidence, when viewed in the light most favorable to Plaintiff, was sufficient to establish a genuine question of material fact as to whether there ever was any probable cause to initiate the underlying action against Plaintiff; (2) the Defendants have a duty in tort to exercise due care in exercising their statutory dues with due regard to a person's legitimate business activities arising under [Haw. Rev. Stat. §487-1](#); and (3)Hawaii recognizes the tort of malicious prosecution for continuing an action found to lack probable cause.

It is submitted that the judgment in favor of Defendants, including the Order granting Plaintiff's motion for review and/or to set aside taxation of costs filed August 23, 2010, should be vacated and the case should be remanded to the Circuit Court for a trial on the merits.

Footnotes

- 1 Defendant Moriyama only learned of Limuel and Hazel Cherry after the filing of his lawsuit against Plaintiff. ROA, Prt 1, Adobe p. 185, Declaration of Michael J.S. Moriyama, attached to Defendants', Motion for Summary Judgment at ¶17.
- 2 As the court offered no factual basis for its determination that the underlying action was not initiated with malice, for the purposes of the instant appeal, it is presumed that its determination was based on its finding that the action was initiated with probable cause.
- 3 Defendants learned of the Cherrys *after* the filing of the underlying action. See, Declaration of Michael J.S. Moriyama, attached to Defendants' Motion for Summary Judgment,at I 17 (ROA, Prt 1, Adobe p. 185).